IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

BRAZOS STUDENT FINANCE CORPORATION,	)	
	)	No. CPU6-08-000169
Plaintiff,	)	
vs.	)	
KOMBA M. KPAKIWA and CAROLEE KPAKIWA,	)	
Defendants.	)	

Submitted May 14, 2011
Decided June 30, 2011

Patrick Scanlon, Esquire, Attorney for Plaintiff
Maggie Clausell, Esquire, Attorney for Defendants

DECISION REGARDING SANCTIONS

Plaintiff Brazos Student Finance Corporation ("Plaintiff") brought this debt action against Defendants Komba and Carolee Kpakiwa ("Defendants"). On the day of trial, April 6, 2011, the Court ruled that Plaintiff's claim was time-barred by the Pennsylvania statute of limitations. The manner in which the Court came to apply the Pennsylvania statute, rather than Delaware's debt limitations period, is the Court's concern in this decision. In short, the Court must determine whether defense counsel's vague letter, sent to the Court approximately one week before trial, requesting application of Pennsylvania law,

and the circumstances attendant to that letter, amount to sanctionable conduct under Court of Common Pleas Civil Rule 11 or the American Rule of cost-shifting.

BACKGROUND

Plaintiff filed this student loan debt action against the Defendants, the student's guarantor parents, nearly three years ago. Shortly after service, Defendants filed a motion to dismiss for failure to state a claim. In that motion, Defendants also raised the affirmative defense that the statute of limitations applicable to debt actions expired before Plaintiff filed its complaint. Although Defendant's motion was ultimately denied, the parties continued to dispute the statute of limitations issue for the next two and one-half years.

It was the Plaintiff that first asserted in its early pleadings that the applicable limitations period was six years under 10 *Del. C.* § 8109.[1] Although the parties contested the date upon which the cause of action accrued to commence the running of the limitations period, at no time during the litigation prior to March 29, 2011 did Defendant contend that a shorter limitations period applied as a matter of law. It is clear that the Defendant conceded or otherwise accepted applicability of the six year limitations period. Each party committed significant time and money toward discovery on the issue of when the cause of action accrued to commence the running of the limitations period, as well as in

[1] 10 *Del. C.* § 8109 ("When a cause of action arises from a promissory note, bill of exchange, or an acknowledgment under the hand of the party of a subsisting demand, the action may be commenced at any time within 6 years from the accruing of such cause of action.").

motion and appellate practice regarding the same issue, both in this Court and on appeal to the Superior Court.

Plaintiff filed a motion for summary judgment in October 2009. At the subsequent hearing, the Commissioner of the Court found that a material issue of fact did not exist concerning the statute of limitations defense and recommended that the Court enter summary judgment in favor of Plaintiff. After the Court affirmed the Commissioner's recommendation, Defendants appealed the decision to the Superior Court. On appeal, the Superior Court reversed this Court's judgment, holding that a material fact issue remained as to when the ***six year*** limitations period began to run, and remanded for trial on that sole issue.[2] This was dependent on a factual determination because the student loan in question became due sixty days after the student was no longer enrolled in school, and the parties disputed that triggering date. Plaintiff had filed suit only a few days shy of the limitations date it believed applied, based on the six year limitations period.

The remanded trial was set for April 6, 2011. On March 29, eight days before trial, defense counsel submitted a signed letter to the Court. The letter stated:

> We are writing to ask that pursuant to *Delaware case law*, the Court apply Pennsylvania law to the . . . action. Plaintiff in this case sues for breach of a contract that was formed in Pennsylvania when <u>all</u> parties to the contract resided in Pennsylvania. The contract was performed in Pennsylvania. Delaware's only relationship to this contract is that the Defendants currently reside in Delaware. (*Emphasis added.*)

The only remaining issue for trial was whether the action was barred by the applicable limitations period; consequently, although defense counsel's request

[2] *Kpakiwa v. Brazos Student Loan Corp.*, 2010 WL 2653413 (Del. Super. Ct. July 1, 2010).

was vague and non-specific as to *what* Pennsylvania law she wished the Court to apply at trial, the Court deduced it must be a Pennsylvania limitations statute. And although defense counsel stated she made the request "pursuant to Delaware case law," the Court recognized that the stated grounds for the request echoed the elements of Delaware's "Borrowing Statute" even though she did not directly cite to it. The Borrowing Statute provides, in relevant part:

> Where a cause of action arises outside of this State, an action cannot be brought in a court of this State to enforce such cause of action after the expiration of whichever is shorter, the time limited by the law of this State, or the time limited by the law of the state or country where the cause of action arose, for bringing an action upon such cause of action …"[3]

Defense counsel's vague letter was not filed in the form of a motion. The letter did not specifically direct the Court as to what Pennsylvania law defense counsel sought to apply to the case. Because of its concern that defense counsel's request might cause further delay in this years-old matter, the Court scheduled a teleconference with both counsel on April 5 to ascertain the meaning and intent of defense counsel's request. In the interim, the Court embarked on its own research regarding the Pennsylvania statute of limitations period. The Pennsylvania limitations period applicable to this action is only four years.

Thus, it appears that, at least as of the writing of her letter, defense counsel had discovered that the applicable Pennsylvania statute of limitations was two years shorter than that of Delaware and dispositive of the case in her client's

[3] 10 *Del. C.* § 8121.

favor.[4] No other reason existed for her to make the request to apply Pennsylvania law.

Despite her knowledge that the shorter Pennsylvania limitations period applied and was dispositive of her clients' case, defense counsel nevertheless, on the same day she e-filed her signed letter to the Court, participated in a costly deposition with opposing counsel. Defense counsel did not disclose to opposing counsel that a dispositive statute existed at this time.

During the teleconference, defense counsel confirmed that she intended by her letter to move the Court to apply the shorter four-year Pennsylvania limitations period. Plaintiff's counsel conceded that the Pennsylvania limitations period applied under Delaware's Borrowing Statute and barred the action, unless the Court found Defendants had waived their right to assert it through their failure to do so throughout the litigation. The Court indicated it was unlikely to find a waiver and thereby apply a clearly erroneous limitations period under Delaware law. By this time, however, Plaintiff's trial witnesses were *en route* from Texas by airplane and could not turn back. Consequently, the Court ordered the parties to appear at the scheduled trial the next day to place the entire matter on the record.

At the outset of the trial the next day, the Court held that the Borrowing Statute required the application of the Pennsylvania statute of limitations and found that Plaintiff's lawsuit was time-barred. However, the Court expressed concern with defense counsel's apparent conduct. Specifically, the Court

[4] 42 *Pa. C.S.A.* § 5525.

requested that defense counsel explain her actions from the time of her ambiguous "motion" letter until the date of trial. Unsatisfied with defense counsel's explanation, the Court stated its concern that her actions wasted Court resources, delayed resolution of the matter, and increased both parties' costs of litigation. In addition, the Court requested Plaintiff's counsel to prepare an affidavit of trial expenses so that it may consider whether sanctions were appropriate, and if so, in what measure. The Court further requested defense counsel to then respond to the affidavit and the Court's *sua sponte* inquiry into whether sanctions are merited. In doing so, the Court clearly, on its own initiative, was ordering defense counsel to show cause why she should not be sanctioned for violating the Court's Civil Rule 11 (b).

Plaintiff subsequently moved the Court for trial expenses. Defense counsel's brief in response focused only on her defense that the bad faith exception to the so-called American Rule of cost-shifting is inapplicable here. The response did not directly address sanctions under Civil Rule 11 (c). Nevertheless, this is the Court's order on both Plaintiff's application and Rule 11 sanctions.

DISCUSSION

Rule 11 Violation

Civil Rule 11 requires attorneys who sign pleadings, motions, or other papers to conduct a reasonable inquiry into the operative facts and law cited

therein.[5] Moreover, Rule 11 provides a safeguard against representations to the Court made with an improper purpose, such as causing unnecessary delay and increasing the cost of litigation. Courts applying rules identical to Rule 11 have held that the reasonableness inquiry required by the rule is judged objectively.[6] If the Court finds that an attorney of record violated Rule 11, it may impose sanctions "limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated."[7]

All members of the Delaware Bar are presumed to know this State's statutes and case law, including the so-called Borrowing Statute. Both attorneys in this matter were aware based upon the undisputed facts of this case that the cause of action arose in the Commonwealth of Pennsylvania.[8] Thus, both counsel also should have been aware that Delaware law required the application of the shorter limitations period, whether it be Delaware's or Pennsylvania's.

This Delaware Court does not presume to know or apply the law of any other State unless it is referred to it by a party advocating its applicability to Delaware proceedings. Accordingly, when both parties referred throughout these proceedings to the applicability of Delaware's six-year limitations period, the Court could only presume that, under our Borrowing Statute, the Delaware limitations period was shorter than, or identical to, the Pennsylvania limitations period.

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[5] *Xen Investors, LLC v. Xentex Technologies, Inc.*, 2003 WL 25575770 at *2 (Del. Ch. Dec. 8, 2003) (wherein the Chancery Court applied an identical rule to Ct. Com. Pl. Civ. R. 11).
[6] *Id.*
[7] Ct. Com. Pl. Civ. R. 11(c)(2).
[8] This debt action is regarding a student loan made by a Pennsylvania bank to a Pennsylvania student to attend a Pennsylvania college, which was guaranteed by his Pennsylvania parents, the defendants. Defendants subsequently moved to Delaware after the cause of action arose.

It is apparent that neither party performed a reasonable inquiry into the operative facts and applicable law. Had Plaintiff's counsel done so, it is unlikely that this lawsuit would have been filed in the first instance and the tremendous burden on both Court resources and the parties' pocket books would have been avoided. Likewise, the Court finds that had Defendant's counsel performed the required reasonable inquiry, the issue would surely have been brought to the Court's attention upon the hearing of Defendant's motion to dismiss almost three years ago.

The Court is concerned with the timing and manner in which defense counsel put both the Plaintiff and Court on notice that she intended to invoke a shorter limitations period at the last minute. As previously mentioned, defense counsel's letter was not filed as a proper motion despite counsel's intent to make it so. In addition, the letter appeared intentionally vague, failed to express with particularity what she sought from the Court, and failed to put opposing counsel or the Court on notice of her precise argument. The Court also finds troubling defense counsel's failure to disclose her new, dispositive argument to opposing counsel before a costly and unnecessary deposition, although she clearly had discovered it prior to the commencement of the deposition. Had defense counsel communicated more promptly, clearly and professionally with the Court and opposing counsel, unnecessary use of judicial resources, and costs incurred by the parties may have been avoided.

After reviewing this entire matter and the assertions of counsel in their submissions, the Court cannot find from the facts before it that defense counsel

was intentionally misleading in her communications with the Court and opposing counsel sufficient to warrant sanctions under Rule 11. However, the Court finds defense counsel's performance and conduct in this matter fell short of several of the Principles of Professionalism for Delaware Lawyers adopted by the Delaware Supreme Court and the Delaware State Bar Association.

Specifically, defense counsel apparently failed to recognize and apply Delaware statutory law that was case-dispositive in her clients' favor in this matter until nearly three years of protracted litigation and appellate practice had occurred. When she did discover it, she failed to promptly and clearly notify the Court and opposing counsel in a manner that would assist in the efficient administration of justice and avoidance of unnecessary costs. "Respect for the Court requires careful preparation of matters to be presented; clear succinct and candid oral and written communications . . .."[9] "In dealing with opposing counsel, adverse parties, [and] judges . . . a lawyer should strive to make our system of justice work fairly and efficiently."[10] "A lawyer should expend the time, effort and energy required to master the facts and law presented by each professional task."[11]

However, the Principles of Professionalism are aspirational, and specifically "shall not be used as a basis for . . . sanctions."[12] Further, the Court recognizes that counsel for Plaintiff, as well as Defendants' counsel, apparently

[9] *Principles of Professionalism for Delaware Lawyers*, ¶ A (4).
[10] *Principles of Professionalism for Delaware Lawyers*, ¶ B.
[11] *Principles of Professionalism for Delaware Lawyers*, ¶ A (5).
[12] *Principles of Professionalism for Delaware Lawyers*, Preamble.

failed to recognize that the Borrowing Statute barred action on this debt, and thus shares blame for the waste of resources in this matter.

Plaintiff's Motion for Trial Expenses

The Court must also determine whether Defendants should be assessed Plaintiff's costs of litigation. Delaware Courts follow the American Rule of cost-shifting, whereby prevailing litigants are expected to bear their own costs of litigation absent a showing that the losing party conducted the litigation in bad faith.[13]

First, the bad faith exception to the American Rule generally operates to award the *prevailing* party litigation expenses. As is obvious here, Plaintiff did not prevail in its case against Defendant. Thus, the American Rule is inapplicable.

Second, as set forth above, the Court cannot reward Plaintiff for its own counsel's failure to perform a reasonable inquiry into the facts and law of the case. Plaintiff's counsel should have known as a member of the Delaware Bar that Delaware's Borrowing Statute would require that the shorter Pennsylvania statute of limitations would be applied given the facts of this case and effectively time-bar this litigation.

CONCLUSION

Although the Court finds that counsel for Defendants' late-filed, vague application to the Court on the eve of trial contributed to unnecessary costs to the parties and the waste of judicial resources, and failed to live up to the

[13] *Brice v. State*, 704 A.2d 1176, 1178 (Del. 1998).

aspirations of the Rules of Professionalism, it does not merit sanctions under Civil Rule 11. Likewise, Plaintiff, the losing party in this action, is not entitled to payment of trial expenses.

IT IS SO ORDERED, this _____ day of June, 2011.

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Kenneth S. Clark, Jr.
Judge